

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PPG INDUSTRIES, INC., .
Plaintiff, .
vs. . Case No. 12-cv-03526
UNITED STATES OF AMERICA, et . Newark, New Jersey
al., . January 29, 2016
Defendants. .

TRANSCRIPT OF RECORDED OPINION
BY THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

This oral opinion has been reviewed and revised in accordance with L. Civ. R. 52.1

APPEARANCES:

For the Plaintiff: No one was present

For the Defendants: No one was present

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1 (Commencement of proceedings)

2

3 THE COURT: Presently before the Court is the

4 matter of PPG Industries, Inc., versus U.S., Civil

5 No. 12-3526. This matter is before the Court on the motion

6 of the United States to modify the Court's April 16, 2014,

7 order, Docket Entry 71, to require PPG to prepare and produce

8 a Rule 30(b)(6) witness to testify regarding its allegations

9 in the first amended complaint concerning the 1909 through

10 mid-1954 period in response to the defendant's February 19,

11 2014, Rule 30(b)(6) notice, Docket Entry 122.

12 For the reasons that I will articulate in this oral

13 opinion, the Court will deny the defendant's motion.

14 Briefly, by way of background, PPG Industries filed

15 this action for cost recovery and contribution under the

16 Comprehensive Environmental Response Compensation and

17 Liability Act of 1980, also known as CERCLA, 42 U.S.C. § 9601

18 through 75. See Amended Complaint, October 31, 2012, Docket

19 Entry 16, paragraph 1. Plaintiff alleges that defendants,

20 collectively the United States government, exercised

21 substantial control during World War I and World War II of

22 the Nature Products Refinery Corporation, also known as NPR

23 facility, located in Jersey City, New Jersey. Id. Paragraph

24 3. Plaintiff alleges that NPR owned and/or operated the site

25 whose cleanup costs are the subject of this suit, until

1 August 1954, at which time PPG acquired the sites from NPR
2 and utilized them through September 1963. *Id.* Paragraphs 16
3 through 17. PPG seeks by this action to recover from the
4 government necessary costs it has incurred and continues to
5 incur due to the release or threatened release of hazardous
6 substances at the sites.

7 The government seeks discovery from a corporate
8 designee of PPG, under Fed. R. Civ. P. 30(b)(6), regarding
9 the facts underlying the allegations in the amended complaint
10 regarding the pre-1954 time period during which NPR, not PPG,
11 owned and operated the sites. Parenthetically, there is no
12 allegation that PPG somehow was a corporate successor of NPR.

13 On February 21, 2014, this Court held an in-person
14 status conference in this case. The parties discussed, among
15 other things, the scope of the Rule 30(b)(6) notice served on
16 plaintiff by defendant. See Transcript of Hearing,
17 February 21, 2014, Docket Entry 53 at pages 29 through 35.

18 The issue in that conference was whether PPG should
19 have to prepare and produce a Rule 30(b)(6) designee to
20 answer questions regarding PPG's allegations for the activity
21 at the sites before 1955. The government argued that if PPG
22 was going to make allegations against the government during
23 the period of 1909 to 1954, the plaintiff should be expected
24 to produce a Rule 30(b)(6) designee "to testify as to
25 corporate knowledge reasonably available to it." *Id.* at

1 pages 30 to 31. Plaintiff argued that it should not be
2 required to provide a corporate designee to testify as to the
3 pre-1955 allegations because PPG had no involvement in the
4 facility before 1954.

5 To resolve the issue, the Court decided to allow
6 PPG a limited amount of contention interrogatories designed
7 to elicit the information that the government sought about
8 PPG's allegations as to the pre-1954 time period. Therefore,
9 the Court ruled that at that time, the Court would not
10 require PPG to designate a corporate designee, under
11 Rule 30(b)(6), and instead allowed the government 12
12 contention interrogatories. See Amended Order, April 21,
13 2014, Docket Entry 76.

14 The government now argues that PPG's responses to
15 those interrogatories were deficient and that in any event,
16 the interrogatories fail to serve as an adequate substitute
17 for a Rule 30(b)(6) deposition.

18 This issue came to the fore specifically during a
19 particular deposition of a PPG corporate representative in
20 April 2015, when the government inquired during the
21 depositions about post-1954 issues that "unavoidably refer to
22 events that occurred prior to mid-1954." See Defendant's
23 Brief in Support of Motion to Modify, Docket Entry 122-3 at
24 page 4. PPG's counsel instructed the witness not to answer,
25 claiming that questions regarding the period before 1954

1 violated the Court's April 16, 2014, Order. See April 14,
2 2015 Rule 30(b)(6) Deposition Transcript, Exhibit 7 to
3 Defendant's Motion to Modify, Docket Entry 122-10 at pages 87
4 to 88.

5 The government argues that the Court should now
6 require PPG to designate a Rule 30(b)(6) representative to
7 testify about PPG's allegations concerning the pre-1954
8 period for the following reasons. One, the government argues
9 that the information is necessary for the United States to
10 fully explore the facts of the case. Two, that PPG should
11 reasonably be expected to know the facts underlying its own
12 claims. Three, the contention interrogatories that the Court
13 allowed are an inadequate substitute for the Rule 30(b)(6)
14 testimony in this case because of PPG's inadequate answers to
15 those contention interrogatories, which the government
16 alleges amount to little more than simply restating the vague
17 allegations in the first amended complaint. Four, the
18 testimony is necessary to allow the government to investigate
19 PPG's denial of successor liability for NPR's operations and
20 PPG's continuation of those operations. Five, although PPG
21 may offer expert testimony later, the government is entitled
22 to explore any facts that underlie the expert's opinions.
23 And finally, the government's application for modification is
24 timely.

25 PPG opposes the motion for several reasons. One,

1 | it argues that the government's motion at bottom is a belated
2 | motion for reconsideration; that there are no new facts or
3 | law to warrant modification; and that essentially the
4 | government is far too late in seeking what amounts to
5 | reconsideration.

6 | At the outset, the Court rejects that argument.
7 | The Court's original order and its reasoning made clear that
8 | it would not allow defendant at that time to require a
9 | 30(b)(6) designee to testify. The Court does not agree with
10 | PPG that in so ruling, the Court necessarily foreclosed the
11 | government from, upon receipt of the answers to its
12 | contention interrogatories, being able to raise this issue
13 | later. Therefore, the Court will not deny the government's
14 | application based on timeliness or failure to meet the
15 | requirements of a motion for reconsideration.

16 | PPG also argues that the government's assertion
17 | that its responses to the government's interrogatories were
18 | deficient. In fact, PPG argues the bulk of the historical
19 | documents they have produced were from the government's own
20 | archives, not any material uniquely within the possession,
21 | custody, or control of PPG, but material that is equally
22 | accessible to both parties.

23 | Second, PPG argues that the bulk of the
24 | government's contention interrogatories called for solely the
25 | identification of documents that supported PPG's claims

1 regarding the pre-1954 activity. PPG avers that not only did
2 it specifically identify those documents by Bates stamp
3 numbers, but it also provided a narrative to its answers and
4 thereby actually gave information that exceeded the scope of
5 the government's interrogatories.

6 PPG also argues that it would be unfair and
7 certainly outside the scope of Rule 30(b)(6) to expect PPG to
8 somehow prepare a witness to testify about activities of
9 which PPG was not a part nor has any superior information or
10 access to information. Those materials, PPG continues, "are
11 in no way within PPG's corporate body of knowledge."

12 Plaintiff's Opposition Brief, October 26, 2015, Docket Entry
13 123 at 22.

14 Under Rule 30(b)(6) of the Federal Rules of Civil
15 Procedure, "a party may take a deposition of an individual
16 who is designated to testify on behalf of a company,
17 corporation, or government agency."

18 The use of a 30(b)(6) witness is meant to benefit
19 the discovery process by "more efficiently produce[ing] the
20 most appropriate party for questioning, curb[ing] the elusive
21 behavior of corporate agents, who one after another know
22 nothing about facts clearly available within the organization
23 and suggest that someone else has the requested knowledge,
24 and reduce[ing] the number of depositions for which an
25 organization's counsel must prepare agents and employees."

1 Harris v. New Jersey, 259 F.R.D. 89 at 92 (D.N.J. 2007).

2 A Rule 30(b)(6) deponent must be able to "testify
3 about information known or reasonably available to the
4 organization" called for by the deposition notice. See
5 Fed. R. Civ. P. 30(b)(6). That testimony is binding on the
6 organizational entity and goes beyond the deponent's personal
7 knowledge about the topics. Harris, 259 F.R.D. at 92. See
8 also State Farm Mutual Auto Insurance Company v. New Horizon,
9 250 F.R.D. 203 at 216 (E.D. Pa. 2008) ("a Rule 30(b)(6)
10 designee 'is not simply testifying about materials within his
11 or her personal knowledge, but, rather, is speaking for the
12 corporation about matters to which the corporation has
13 reasonable access.'") (quoting In re Liner Board Antitrust
14 Litigation, 237 F.R.D. 373 at 382 (E.D. Pa. 2006)).

15 In this case, upon consideration of the record and
16 the language and purpose of Rule 30(b)(6), the Court is
17 compelled to deny the government's application to require a
18 PPG representative to testify under Rule 30(b)(6). The
19 linchpin of a Rule 30(b)(6) deposition is, as the Harris
20 court noted, to provide a witness to testify about facts that
21 are "clearly available within the organization." See Harris,
22 259 F.R.D. at 92. As the district court noted as well, in
23 New Horizon, the designee is expected to be able to testify
24 "about matters to which the corporation has reasonable
25 access." New Horizon, 250 F.R.D. at 216.

1 In this case, the Court struggles to understand how
2 matters occurring at the sites before 1954 would be matters
3 that PPG has any greater access to than the government. As
4 noted earlier, PPG was not operating at the site before 1954.
5 There has certainly been nothing submitted to the Court to
6 suggest that PPG was a corporate successor to NPR. And
7 indeed, the documents on which PPG appears to be chiefly
8 relying were obtained not from PPG's own corporate files, but
9 from the government archives.

10 The Court can conclude only that to the extent PPG
11 is expected to produce a witness to testify about those
12 documents and the activities at the site pre 1954 with any
13 greater elucidation than the information already available to
14 the government from the documents and PPG's answers to the
15 contention interrogatories, would be for PPG to essentially
16 provide a witness to testify why PPG believes those documents
17 support PPG's allegations. In other words, that witness
18 would be called upon to apply the documents and the alleged
19 facts to the elements of CERCLA liability. That amounts
20 essentially to testimony regarding PPG's legal theories.
21 That is certainly not the factual testimony contemplated by
22 Fed. R. Civ. P. 30(b)(6).

23 Beyond that, the Court cannot comprehend what it is
24 that the PPG Rule 30(b)(6) designee could be reasonably
25 expected to testify about. In an effort to accommodate the

1 government, the Court allowed the contention interrogatories
2 that I described earlier. Counsel for the defendant now
3 complains that those interrogatories are insufficient largely
4 because PPG did not adequately respond to them and instead
5 provided vague, sweeping or evasive responses.

6 Putting aside the fact that the Court concludes
7 that PPG actually provided answers to the contention
8 interrogatories that arguably exceeded the scope of those
9 questions and did specifically identify the documents on
10 which PPG is relying, it bears noting that defense counsel
11 never came back to ask the Court for more interrogatories or
12 to argue that it needed the additional interrogatories in
13 order to more fully flesh out the bases for the contentions
14 in PPG's complaint. So it is unclear to the Court how the
15 interrogatories failed, and equally unclear to the Court what
16 else the defendant would hope reasonably to get through the
17 Rule 30(b)(6) deposition that it could not or did not get
18 through the interrogatories.

19 And all of that assuming something that is far from
20 having been established to this Court, which is that PPG
21 stands in any better position than does the defendant or has
22 any superior access than defendant to information regarding
23 pre-1954 activities at the sites. As I noted earlier, the
24 documents on which PPG is relying are equally available to
25 both parties. The subject matter is something about which

1 PPG would appear to have no firsthand knowledge, having not
2 operated at the site before 1954.

3 For those reasons, the Court finds that requiring
4 PPG to designate a corporate representative under these
5 circumstances would not be a valid exercise of
6 Fed. R. Civ. P. 30(b)(6), and accordingly, the Court will
7 deny the defendant's motion.

8 That constitutes the opinion of the Court. A
9 corresponding form of order will follow.

10 (Conclusion of proceedings)

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1 | Certification

2 I, SARA L. KERN, Transcriptionist, do hereby certify
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10 done to the best of my skill and ability.

11 I further certify that I am in no way related to any of
12 the parties hereto nor am I in any way interested in the
13 outcome hereof.

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3, para 2.7.7.

2nd of February, 2016

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